Supreme Court, U.S.
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No. 97-1829

In The

Supreme Court of the United States

October Term, 1997

DEBORAH WEST, in her individual capacity and official capacity as an agent of the State of North Carolina; JANICE FAULKNER, Secretary of Revenue, State of North Carolina, in her official capacity; STATE OF NORTH CAROLINA,

Petitioners,

vs.

DAVID LYNN, JR.; ROBIN DIXON LYNN; RODNEY LYNN; ROXANNE LYNN; DAVID L. LYNN, SR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court below correctly apply this Court's holding in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) finding that, "the Drug Tax may not be enforced absent the constitutional safeguards that attach to criminal proceedings."?

2. Did the court below correctly find that the Tax Injunction Act, 28 U.S.C. § 1341 does not apply, "A criminal penalty, however labeled, is not a 'tax under State law' for Tax Injunction Act purposes."?

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The plaintiffs/respondents, David L. Lynn, Jr.; Robin Dixon Lynn; Roxanne Lynn; and David L. Lynn, Sr., respectfully file this brief in opposition of the petition for writ of certiorari filed by the State of North Carolina. Certiorari should be denied.

Faithfully applying this Court's analysis in both *Kurth Ranch* and *Hudson,* the lower court found the North Carolina Drug Tax is a criminal penalty not a civil remedy and therefore could only be imposed with the constitutional safeguards required of criminal sanctions. Contrary to petitioners' exaggerated claim, the lower court neither "adopted a simplistic" approach to the issue nor "made no effort to apply factors traditionally employed to determine whether particular legislation is" criminal despite being labeled civil. Petition for Certiorari at 11, 14. Rather, the lower court charted a course remarkably consistent with this Court's recent disavowal of a case-by-case approach to the issue at hand in favor of a categorical assessment. *Hudson,* 139 L. Ed. 2d 456-57, 459-60 (disavowing *United Sates v. Halper,* 490 U.S. 435, 448 (1989) in favor of factors articulated in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 169 (1963)). This well-reasoned analysis presents no issue of constitutional significance meriting certiorari review. This Court has just reaffirmed the *Kurth Ranch* analysis in *Hudson* and endorsed the *Mendoza-Martinez* criteria as the guideposts for determining when a civil remedy attains a sufficiently punitive character to trigger the constitutional protections required before a criminal penalty may be imposed. The Fourth Circuit followed *Hudson.* Accordingly, no need exists for review by the Court.

STATEMENT OF THE CASE

On March 1, 1993, the Rockingham County Sheriff's Office, agents of the United States Government, and agents of the North Carolina Department of Motor Vehicles, searched the

residence of David L. Lynn, Jr. ("Respondent") at 2995 Wentworth Street, City of Reidsville, Rockingham County, North Carolina. During the search of Lynn's residence a quantity of cocaine was found by the agents. Before executing said search, agents of the State of North Carolina as outlined above obtained a warrant to search the residence of David L. Lynn, Jr. The search warrant was obtained using conflicting information received from David L. Lynn and for the purpose of searching the residence to find controlled substances.

Prosecution of the Respondent commenced on March 1, 1993, when he was arrested and charged by Officers of the Rockingham County Sheriff's Department for a violation of the North Carolina controlled substances laws.[1]

On March 2, 1993, Janice Faulkner in her official capacity as Secretary of Revenue issued a notice of controlled substance attached assessment and a certificate of tax liability.

On March 4, 1993, the North Carolina Department of Revenue caused a writ of execution to be issued in a court for the Superior Court of Rockingham County.

On the 18th day of March 1993, Respondent filed an Objection to Assessment and Application For Hearing with the North Carolina Department of Revenue. On April 12, 1993, before hearing was held on said objection, agents of Petitioner seized items of personal property belonging to Respondent from his residence.

On March 23, 1993, United States Attorney's Office for the Middle District of North Carolina filed a civil in-rem forfeiture complaint against various items of property allegedly

1. Those charges were subsequently dismissed after Lynn's trial on the same charges in federal court.

belonging to Respondent. Among the items of property that was sought to be forfeited by the United States Attorney's Office was a commercial building located at State Highway Number 87 and 65 West of the Corporate Limits of the City of Reidsville, North Carolina ("Radio Station"), one Mercedes Benz automobile VIN#0704412032106, and one Mitsubishi automobile VIN#JA3XE74C2NY063332, said forfeitures occurring in cases numbered 2:93CV171 and 2:93CV172.(JA-10) Notice by Publication was given to all persons claiming an interest in the property or else be defaulted, including the State of North Carolina. The Petitioner chose not to assert their claim in either of these actions.

On March 29, 1993, Respondent was indicted by the United States District Court for the Middle District of North Carolina for possession with intent to distribute controlled substances.

On June 16, 1993, Respondent was convicted following a jury trial in United States District Court. Additionally the jury found that the residence at 2995 Wentworth Street should be criminally forfeited.

The forfeitures went to hearing and were resolved by the United States District Court of the Middle District of North Carolina on or about November 1993. All non-appearing parties were defaulted, including the State of North Carolina. As a result of the decision of the United States District Court, the property was ordered turned over to Terry Harn, Attorney at Law, for distribution to the appropriate owners.

Prior to the search and arrest, respondent had executed a contract conveying the Mitsubishi automobile referred to above to Robin Dixon (now Robin Dixon Lynn) for good and valuable consideration. Robin Dixon subsequently married Respondent and became entitled to the exclusive ownership of the Mitsubishi

automobile. As part of the proceedings and the forfeiture action, Robin Dixon testified in deposition to all matters involved in the transfer of the Mitsubishi automobile including her contract with Respondent.

On March 11, 1994, A. Wayne Harrison, an attorney representing David L. Lynn, Jr., communicated with Mr. Michael Hanna, an officer of the North Carolina Department of Revenue in an attempt to further the claim of David L. Lynn, Jr. for the return of property previously seized and in an attempt to eliminate the levy of the North Carolina controlled substances act. On March 14, 1994, Harrison was notified that he could submit his argument in support of David Lynn's position to the North Carolina Department of Revenue, an agency of the executive department of the State of North Carolina, in written form without appearing.

On March 31, 1994, Harrison submitted a written statement of objections to the assessment of the North Carolina controlled substances tax act, said objections including but not limited to an assertion of the unconstitutional seizure under the Fourth Amendment of the United States Constitution and further alleging that the imposition of the drug tax was a violation of the double jeopardy clause of the United States Constitution.

On May 9, 1994, Hanna issued his final decision. The decision did not discuss the constitutional questions raised by Harrison. Hanna had previously indicated he would not consider Constitutional objections. The Controlled Substances Act prohibited him from considering these objections.

On August 9, 1994, Deputy of the United States Marshall John Spray called Terry Harn to advise him that the Mercedes automobile could be released and requested that Harn agree to turn the vehicle over to Deborah West. The Mercedes automobile

is lawfully titled to Rodney Lynn, petitioner in this case. Deborah West seized said automobile pursuant to some process issued by the North Carolina Department of Revenue.

REASONS FOR DENYING THE WRIT

This Court should deny a writ of certiorari because the lower court correctly applied in both *Kurth Ranch* and *Hudson* in finding that the North Carolina drug tax is a criminal penalty requiring the protections afforded by both the Fifth and Sixth Amendments. A fact ignored by petitioners is that the primary thrust of *Hudson* was to disavow the analysis in *Halper*. Indeed, the lower court neither discussed nor cited *Halper* in its analysis of this issue. The lower court relied primarily upon the analysis in *Kurth Ranch*. Critically, and wholly ignored by petitioners, *Hudson* did not disavow *Kurth Ranch* in any way. In fact, *Hudson* acknowledged that the "ill considered" analysis in *Halper* had proved unworkable in *Kurth Ranch*. 139 L. Ed. 2d at 460-61. *Hudson* cited with approval the analysis by the *Kurth Ranch* majority that *Halper* did not decide the very different question at issue in *Kurth Ranch*. *Id.* Furthermore, the *Hudson* majority recognized that the presence of a deterrent purpose or effect is not dispositive of that issue at hand, a position contrary to *Halper*. *Hudson* recognized that *Kurth Ranch* had not followed *Halper* but had, instead, "applied a *Kennedy*-like test." *Hudson* 139 L. Ed. 2d at 461 n.6. *Hudson* adopted this very test applied in *Kurth Ranch*. Thus, the Fourth Circuit faithfully applied *Kurth Ranch* to the extent that it necessarily faithfully applied *Hudson* contrary to petitioners' mistaken impression

Unquestionably, *Hudson* adopts the *Mendoza-Martinez* paradigm as the appropriate test for determining whether a statute characterized as imposing a civil sanction or remedy actually crosses the line and imposes a criminal penalty or punishment.

Certiorari is likewise not warranted because of the lower court's treatment of the Tax Injunction Act. As the lower court correctly recognized, this statute prohibits a district court from exercising jurisdiction over an action to enjoin, suspend or restrain a tax under state law where the state provides a plain, speedy, and efficient remedy. Applying the *Hudson/Kurth Ranch/Mendoza-Martinez* test to the North Carolina drug tax, the lower court correctly concluded it was a criminal penalty rather than a civil remedy. Under those circumstances, it did not constitute a "tax under State law." This determination is consistent with earlier decisions of this Court holding that a statutory prohibition against a court restraining the collection of any tax does not apply to a tax that actually operates as a criminal penalty. *See Lipke v. Lederer,* 259 U.S. 557, 561-62 (1922); *accord Regal Drug Corporation v. Wardell,* 260 U.S. 386, 392 (1922). This analysis, consistent with earlier decisions of this Court, does not present a significant constitutional issue worthy of certiorari review.

I.

THE COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED *KURTH RANCH* AND *HUDSON* TO HOLD THAT NORTH CAROLINA'S DRUG TAX LAW IS A CRIMINAL PENALTY.

A. The Court Of Appeals' Opinion Interprets *Kurth Ranch* And *Hudson* Consistent With Other Decisions Of This Court And Is Consistent With The Notion That Penalties Which Are Civil In Name Only Do Not Lose Their Punitive Character With The Attachment Of A Civil Label.

The court of appeals correctly interpreted and applied this Court's decision in *Kurth Ranch* and *Hudson* to hold that North Carolina's excise tax on the possession of specified quantities

of illegal drugs is a criminal penalty, which requires the State to provide all the protections constitutionally mandated for criminal prosecutions. The primary failing in petitioners' request for certiorari review hinges on its misunderstanding of *Hudson* vis-a-vis *Kurth Ranch*. This Court explicitly accepted certiorari in *Hudson* to answer whether an in personam civil penalty constituted punishment for the purpose of the constitutional protection against double jeopardy. In doing so, *Hudson* clarified the appropriate test for determining when civil remedy crosses the line into a criminal penalty for constitutional purposes. *Hudson* "disavowed" the approach in *Halper*. In reaching this conclusion, *Hudson* recognized several recent cases had taken different approaches in resolving the same issue. Specifically, it noted *Kurth Ranch* did not follow the now-defunct *Halper* analysis. Rather, *Kurth Ranch* followed the approach outlined in *Mendoza-Martinez* that *Hudson* endorsed. *Hudson* 139 L. Ed. 2d at 461 n.6. If a court uses the *Kurth Ranch* analysis, it is acting consistently with *Hudson*.

The Fourth Circuit below followed the approach in *Kurth Ranch*. Indeed, it relied primarily on *Kurth Ranch* in its extensive analysis. *Lynn*, 134 F.3d 582. The court below studiously and painstakingly analyzed the substantive effect of the North Carolina drug tax as required by *Kurth Ranch*. Petitioners claim the lower court focused on the limited feature of deterrence in *Kurth Ranch* to the exclusion of all other factors. Nothing could be more inaccurate. The lower court carefully studied the North Carolina drug tax along each of the four factors in *Kurth Ranch*: whether the tax was imposed at a high rate, whether the tax had deterrent purposes, whether the tax was conditioned on commission of a crime, and whether the tax had no relationship to a lawful purpose. *Lynn*, 134 F.3d 582. The lower court correctly concluded that the North Carolina drug tax failed each of the four factors. That this alleged tax failed each of the four factors outlined in *Kurth Ranch*, then, demonstrated that

respondent showed by the "clearest proof," *Hudson*, 139 L. Ed. 2d at 459 (*quoting United States v. Ward*, 448 U.S. 242, 249 (1980), the criminal nature of the so-called tax.

The state attempts to distinguish its "tax" from Montana's by saying that the citizen can't be taxed if he doesn't own or possess the taxed substance. It is difficult to imagine a situation where the state would find a citizen to possess or own a controlled substance without being caught with the substance and having the substance confiscated.

The court of appeals required Fifth and Sixth Amendment protections because it determined a criminal penalty was being imposed on the affected citizen.

A careful reading of the opinion below, a reading not taken by petitioners, shows the Fourth Circuit essentially followed all of the guideposts articulated in *Mendoza-Martinez* and adopted in *Hudson*. These seven points include (1) does the sanction involve an affirmative disability or restraint; (2) has the sanction historically been regarded as punishment; (3) does the sanction come into play only on a finding of *scienter*; (4) does the sanction promote the traditional aims of punishment, i.e. retribution and deterrence; (5) does the sanction apply to behavior that is already a crime; (6) is there an alternative purpose for the remedy that can rationally be connected to it; and (7) does the sanction appear excessive in relation to this alternative purpose? *Hudson*, 139 L. Ed. 2d at 459 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69.) The lower court explained its results in terms of the four factors in *Kurth Ranch*. Even a cursory examination of these four factors reveals, however, that they embodied most, if not all, of the seven factors in *Mendoza-Martinez*.

The first *Kurth Ranch* factor is the high rate of taxation. It goes to both the second and seventh factors in *Mendoza-*

Martinez. A high rate of taxation indicates its punitive character as a high fine has historically been viewed as punishment. It also shows its excessive nature when viewed against an alternative purpose other than punishment for it. The lower court also recognized that North Carolina has been the most aggressive of all the states in pursuing a tax on controlled substances. Indeed, the lower court found the tax imposed in North Carolina is excessively high and disproportionate.

The second *Kurth Ranch* factor involved the deterrent purpose of the civil remedy. The fourth factor in *Merdoza-Martinez* is the deterrent purpose of the allegedly civil remedy. As the lower court correctly found, the high amount of tax imposed reflected a legislative intent to deter possession of these illegal drugs.

The third factor in *Kurth Ranch* applied by the court below is whether the civil remedy is conditioned on a commission of a crime. This factor encompasses both the third and fifth guideposts in *Mendoza-Martinez*. The third factor was whether the tax required *scienter. Scienter* is essentially criminal intent or the existence of a guilty mind. W. LaFave & A. Scott, Criminal Law 212 (2d ed. 1986). Obviously, a tax or civil remedy imposed for possessing illegal narcotics requires some criminal intent or a guilty mind. Likewise, the fifth factor in *Mendoza-Martinez* is whether the tax is imposed on criminal conduct. In North Carolina, one cannot possess illegal narcotics without committing a crime. There can be no lawful possession of the controlled substances seized and taxed in this case. The tax is inextricably connected to criminal conduct.

The fourth factor in *Kurth Ranch* is whether the tax bears no relationship to a lawful purpose or possession. *Kurth Ranch* explained this question asks if the payment of a tax allows the taxpayer to legally or lawfully possess the taxed substance. As

explained above, payment of the North Carolina drug tax creates no lawful possession of the taxed substances. Thus, payment of the tax bears no relationship to a lawful purpose. This factor encompasses the sixth criterion in *Mendoza-Martinez* — whether an alternative purpose may be rationally assigned to the tax.

As this analysis reveals, a fair reading of the opinion below demonstrates it complied with virtually all of the criteria articulated in *Mendoza-Martinez* and endorsed by *Hudson*. The only standard arguably omitted is whether the civil remedy created an affirmative disability or restraint. This civil remedy essentially operates as an affirmative disability or restraint given the extremely high rate of taxation in this case, North Carolina's very aggressive pursuit of this tax, and the criminal conduct necessarily required for a person to owe the tax. Only actual incarceration could cause a greater disability or restraint. Under these circumstances, it is beyond peradventure that the lower court correctly determined the challenged tax constitutes a criminal penalty or punishment under the *Mendoza-Martinez* criteria. Hence, it followed *Hudson*.

In the present case the tax imposed, in excess of $390,000 exceeds the value of the substance on the "black market", about $30,000, or twelve times its "black market" value. The state characterizes the tax as deterrence (and erroneously says the Fourth Circuit analyzed the tax only on this basis) or retributive while its realistic effect is the economic evisceration of a citizen. The only citizens in the Respondent's position who would not lose every item of value that they had plus what they would have for their life or the greater portion of it is those who would have a net worth in excess of $390,000. In this connection, the maximum fine for conviction of the criminal offense of Possession of a Controlled Substance with the Intent to Sell and Deliver (cocaine) carries a maximum fine of $250,000 or $140,000 less than the "tax" imposed on the Respondent in

this case. *See* N.C.G.S. § 90-95(h)(3)c at page 10a of appendix. The state's argument that there is no clear proof to convert this "tax" into a penalty is patently absurd when the maximum fine under the parallel criminal statute carries a smaller penalty than the state's alleged civil "tax".

II.

THE COURT OF APPEALS CORRECTLY ASSUMED JURISDICTION IN KEEPING THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, AND NUMEROUS DECISIONS OF THIS COURT.

A. The North Carolina Controlled Substance Tax Does Not Provide A "Plain, Speedy And Efficient" Remedy For The Citizen.

Petitioner argues that the court of appeals should not have entertained jurisdiction in contravention of the Tax Injunction Act, 28 U.S.C. § 1341. Explicit in their argument is that the North Carolina procedure provides a "plain, speedy and efficient" remedy to the taxpayer to redress his grievances. This issue was reserved by the Court of Appeals and not discussed because they concluded that the "tax" was a penalty.[2]

It is a "plain, speedy and efficient" remedy only if you consider a remedy efficient where the claimant cannot complain of unconstitutional practices. In North Carolina the administrative review does not allow for the raising of constitutional objections and the Respondent was not allowed to do so in this case. *See Great American Insurance Co. v. Gold*, 254 N.C. 719, 144 S.E. 2d 904 (1965).

2. An additional issue as to whether the taxing structure as applied constituted an unconstitutional Bill of Attainder was also reserved by the Court in view of the penalty finding.

Only after complete payment of the tax or posting of a bond equal to the amount of the tax can the citizen obtain review in a judicial proceeding and raise his constitutional objections. *See* N.C.G.S. § 105-241.4.

The decision of the court of appeals to assume jurisdiction on the grounds that the "tax" was really a criminal penalty was warranted by the facts in this case. The Holding of the court of appeals does not affect the amount of the tax or the ability of the Petitioner to collect it. It only requires that the state give the citizen the right to have the issue of the tax determined by a Judge and Jury. If the drug tax is useless it can only be because the Petitioner does not believe it will be able to collect any of the tax if it affords the citizen some measure of legitimate due process.[3]

B. The North Carolina Tax Is Not A Tax But A Penalty.

The North Carolina "tax" is not a tax but a penalty for the following reasons: (1) the amount of the tax exceeds the maximum amount of criminal fine that can be imposed for the same conduct; (2) the tax imposed does not take into account the ability of the citizen to pay; and (3) it crosses the boundary for excessive fines.

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3. The undercurrent in this case is a political issue which the Petitioner has carefully sought to avoid. Under the North Carolina Constitution if the state collects a fine or forfeiture the proceeds go to the public schools. The police however, were taking seized property to the federal authorities even when not lawfully entitled to do so because the federal authorities would give the police a portion of the seized assets. Rather than use the traditional methods of seizing drug assets like those of the federal government, the state must find a away around their constitution. For an explanation of the situation *see United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267 (4th Cir. 1990). So in order for the state to get any drug proceeds they had to find a way to pay off the police.

Unlike a criminal fine that requires an analysis by the trial court of the ability of the wrongdoer to pay the "tax" requires no such analysis and exceeds the maximum amount of a criminal fine.

It has been recognized in the jurisprudence of this country since the beginning that "the power to tax is the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Fines or civil punishments that are out of proportion to the wrong sought to be redressed are to be viewed with suspicion and even struck down if the amount of the penalty is grossly disproportional to the gravity of the defendant's offense. *See United States v. Bajakajian*, __ U.S. __ (Case No. 96-1487, decided June 22, 1998):

> Similarly, Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:
>
> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.
>
> Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.).

As *Bajakajian* outlines clearly shows, the original intent of the excessive fines clause was to prevent impoverishment for the

sake of punishment. Certainly if a criminal fine is deemed excessive if it deprives the wrongdoer of his right to economically exist the excessiveness of that fine does not become palatable because it is labeled a tax.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons North Carolina's petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

WEST'S NORTH CAROLINA STATUTES
CHAPTER 90. MEDICINE AND ALLIED OCCUPATIONS
ARTICLE 5. NORTH CAROLINA CONTROLLED SUBSTANCES ACT

Sec. 90-95. Violations; penalties

Text of section effective January 1, 1995

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

Appendix A

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is one gram or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony. If the controlled substance is phencyclidine, the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may

not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or

(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon.

(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

Appendix A

(1) Anthranilic acid.
(2) Benzyl cyanide.
(3) Chloroephedrine.
(4) Chloropseudoephedrine.
(5) D-lysergic acid.
(6) Ephedrine.
(7) Ergonovine maleate.
(8) Ergotamine tartrate.
(9) Ethyl Malonate.
(10) Ethylamine.
(11) Isosafrole.
(12) Malonic acid.
(13) Methylamine.
(14) N-acetylanthranilic acid.
(15) N-ethylephedrine.
(16) N-ethylpseudoephedrine.
(17) N-methylephedrine.
(18) N-methylpseudoephedrine.
(19) Norpseudoephedrine.
(20) Phenyl-2-propane.
(21) Phenylacetic acid.
(22) Phenylpropanolamine.
(23) Piperidine.
(24) Piperonal.
(25) Propionic anhydride.
(26) Pseudoephedrine.
(27) Pyrrolidine.
(28) Safrole.
(29) Thionylchloride.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by

the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Laws 1979, c. 760, Sec. 5.

(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level;

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age or a pregnant female shall be punished as a Class E felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant;

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses shall be counted by the number of separate trials at which final

convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor;

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class I felony.

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall

follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be

sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months

in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of amphetamine, its salts, optical isomers, and salts of its optical isomers or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in amphetamine" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate

(except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall

be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section.

Amended by Laws 1993, c. 538, Sec. 30, eff. Jan. 1, 1995; Laws 1993, c. 539, Sec. 1358.1, eff. Jan. 1, 1995.

For text of section effective until January 1, 1995, see Sec. 90-95, ante.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Laws 1993, c. 538, Sec. 56, provides:

"This act becomes effective January 1, 1995, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Laws 1993, c. 538, was ratified July 24, 1993.

Laws 1993, c. 539, Sec. 1359, provides:

"This act becomes effective January 1, 1995, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not

abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Laws 1993, c. 539, was ratified July 24, 1993.